

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO OFFICE**

NP RED ROCK LLC d/b/a
RED ROCK CASINO RESORT SPA

and

Cases 28-CA-244484
28-CA-250950

CLAUDIA MONTANO, an Individual

and

Cases 28-CA-250229
28-CA-250282
28-CA-250873
28-CA-252591
28-CA-253276
28-CA-254470
28-CA-254510
28-CA-254514
28-CA-260640
28-CA-260641
28-CA-262187
28-CA-262803
28-CA-164605

NP BOULDER LLC d/b/a
BOULDER STATION HOTEL & CASINO

and

Case 28-CA-254155

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION

NP PALACE LLC d/b/a
PALACE STATION HOTEL & CASINO

and

Case 28-CA-254162

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION

NP RED ROCK LLC d/b/a
RED ROCK CASINO RESORT SPA

and

Case 28-RC-252280

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION

**ORDER GRANTING RESPONDENT'S PETITION TO REVOKE GENERAL
COUNSEL SUBPOENAS AD TESTIFICANDUM A-1-AIUQ3D AND A-1-1AIV91L**

Respondent Red Rock petitions to revoke two subpoenas ad testificandum (A-1-AIUQ3D and A-1-1AIV91L) that the General Counsel served on Frank Fertitta III and Lorenzo Fertitta to appear and testify at the hearing in this consolidated unfair labor practice and postelection objections proceeding, which is scheduled to commence October 27 via Zoom.¹ Frank Fertitta III is the CEO and Chairman of the Board of Red Rock Resorts, Inc. and CEO of Station Casinos LLC. Lorenzo Fertitta is Vice Chairman of the Board of Red Rock Resorts, Inc. and Vice President of Station Casinos LLC.²

The petition to revoke is granted. Section 102.31(b) of the Board's Rules states, in relevant part, that a subpoena will be revoked if

the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is invalid.

The GC's opposition asserts that the Fertittas' testimony is relevant to the complaint's allegations that Respondent granted a package of benefits to employees shortly before the December 19–20, 2019 representation election to discourage employees from supporting the Union in violation of Section 8(a)(1) of the Act. The benefits package allegedly included, among other things, an HMO health plan offered at zero cost to employees and their spouses and children, onsite medical centers with free and fast visits, a company paid retirement plan, and an employee recognition program. The GC asserts that there is every reason to believe the Fertittas, sitting at the head of the organization, would have personal knowledge as to how, when, or why Respondent Red Rock formulated such a major employee benefits package and would have been directly involved in deciding to grant the benefits package to employees before the election.

However, as indicated by Respondent, the complaint itself does not allege that the Fertittas made the decision to grant the benefits package before the election; rather, it alleges that other high level managers granted the benefits, including General Manager Scott Nelson and Senior VP of HR Phil Fortino. Indeed, until the most recent, fourth consolidated complaint, which issued October 8 and added various other allegations, the GC did not even mention the Fertittas or allege that they are Respondent's supervisors and/or agents (which Respondent's October 22 answer admits).

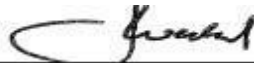
¹ The Respondent's petition to revoke was filed on October 14, and the General Counsel's opposition was filed on October 21. The hearing is expected to last at least 30 days (nonconsecutively over several months) and include testimony from approximately 95 witnesses.

² See Respondent's answer to the fourth consolidated complaint. According to Respondent's petition to revoke, Red Rock Resorts, Inc. is a publicly traded company that owns a direct equity interest in and manages Station Casinos LLC, which owns and operates Respondents Red Rock, Boulder, and Palace.

Further, it is not the GC's burden to show how, when, or why Respondent formulated the benefits package. The Board infers that an announcement or grant of benefits during the critical period between the filing of a representation petition and the election is objectionable and violative of Section 8(a)(1). It is the employer's burden to rebut this inference by showing there was a legitimate business reason for the timing of the announcement or grant of benefits, i.e., that the benefits were part of a previously established company policy and the company did not deviate from that policy upon the advent of the union. See *Watco Transloading, LLC*, 369 NLRB No. 93, slip op. at 16 (May 29, 2020); and *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 13 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019), and cases cited there.³ And whether the Fertittas' testimony would be relevant and helpful in discrediting Respondent's rebuttal case appears entirely speculative at this point.⁴

Accordingly, the Fertitta subpoenas ad testificandum are revoked without prejudice to the GC seeking reconsideration or reissuing the subpoenas if the documents produced pursuant to the GC's subpoena duces tecum⁵ and/or the evidence adduced at the hearing provide substantial reasons to believe the Fertittas' testimony would be relevant to any of the complaint allegations and that its probative value would not be "substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence" under FRE 403.

Dated, San Francisco, California, October 23, 2020



Jeffrey D. Wedekind
Administrative Law Judge

³ Thus, this is not a situation, as in 8(a)(3) discrimination cases, where subpoenaing the CEO or other top executives to testify as adverse witnesses under FRE 611(c) regarding the company's knowledge of union activity, motive, and defense might be relevant and helpful in establishing the GC's prima facie case. Although the consolidated complaint includes various 8(a)(3) allegations, the GC's opposition to the petition to revoke does not assert that the Fertittas' testimony is relevant to them.

⁴ In light of the foregoing, it is unnecessary to address Respondent's argument that the so-called "apex doctrine" applied by some courts under FRCP 26 and 45 in evaluating pretrial depositions of top corporate officials should be applied to Board hearing subpoenas and that the Fertitta subpoenas should be revoked pursuant to that doctrine. See *F.T.C. v. Bisaro*, 757 F. Supp. 2d 1, 9 (D.D.C. 2010). See also *Zimmerman v. Al Jazeera America, LLC*, 329 F.R.D. 1, 6-7 (D.D.C. 2018).

⁵ Respondent's pending October 21 petition to partially revoke the GC's subpoena duces tecum (B-1-1AM2EGB), including Respondent's argument that the subpoena should be revoked to the extent it seeks production of documents from the Fertittas, will be addressed separately.

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